YIP CHEE SENG SONS SDN BHD

v.

ORNACONSTRUCTION CORPORATION SDN BHD

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[ORIGINATING MOTION NO: 25-3-1999]
10 JUNE 1999

ARBITRATION: *Arbitrator - Removal of - Application to remove incumbent arbitrator and replace with another pursuant to s. 12 of Arbitration Act 1952 - Whether s. 12 inapplicable - Whether leave of court required for removal - Arbitration Act 1952, s. 3 - Whether s. 9 of Act permitted appointment of two arbitrators - Whether notice of applicant to respondent to replace incumbent arbitrator with another was flawed - Whether incumbent arbitrator refused to act within context of s. 12(b) of Arbitration Act 1952*

CIVIL PROCEDURE: *Mode of commencement - Arbitration - Appointment of arbitrator - Application under s. 12 of Arbitration Act 1952 - Whether wrong mode - Whether by way of originating summons - Whether O. 92 r. 4 Rules of the High Court 1980 applicable*

CIVIL PROCEDURE: *Affidavits - Affidavit-in-support affirmed before filing of originating motion - Whether admissible - Rules of the High Court 1980, O. 41 r. 1*

The parties herein had a disagreement pertaining to payments over the construction of a golf course. Clause 14 of the agreement for the said construction allowed the matter to be referred to an arbitrator. An application made to the High Court confirmed that the matter should be resolved before an arbitrator and an arbitrator was appointed by the applicant accordingly. Meanwhile, the respondent appealed against the decision of the High Court.

In this instance, the applicant applied pursuant to s. 12 of the Arbitration Act 1952 ('the Act') to have the incumbent arbitrator removed and replaced with another. The applicant claimed that the arbitrator refused to proceed with the arbitration on the basis that it was prudent to await the outcome of the pending appeal. The applicant had earlier sent a notice to the respondent of its intention to replace the incumbent arbitrator with a new one.

Before the court proceeded to hear the application, the respondent raised the following objections: (1) that the instant application should be by originating summons and not originating motion as filed; (2) that the affidavit-in-support being affirmed before the filing of the application was invalid; and (3) that the court could only appoint an arbitrator and not remove him under s. 12 of the Act.

Held:

[1] Section 12 of the Act merely makes reference to the word "application" without specifically stating the mode of the procedure to be used by an applicant. Neither is the format of an application clarified nor the manner of the removal of an arbitrator provided for.

[1a] It was not necessary to delay the matter primarily on the pretext of some defect of format as much water had flowed under the bridge. Also, to allow the preliminary objection would certainly do disservice to the current backlog faced by the courts. By virtue of O. 92 r. 4 Rules of the High Court ('RHC'), the preliminary objection was dismissed. Any procedural defect, which in the circumstances could not occasion any prejudice to the respondent, was capable of being compensated by costs.

[2] The phrase "entitled in that cause or matter" in O. 41 r. 1 RHC did not refer to the case number as stated in *Arab Malaysian Finance Berhad*, but to the action between the existing parties. The law only requires strict compliance with rules that are statutorily promulgated.

[2a] Order 41 RHC provides that the affidavit must be entitled, meaning that the affidavit must have been executed in anticipation of some specific cause, suit or action. The legal system will invariably act as an obstacle to economic progress if parties are expected to affirm the affidavits only on the day or after the suits or actions have been filed.

[2b] In the absence of any requirement of law for the affidavit to be affirmed on the same date as that on which the originating summons is filed or later, an affirmation which precedes the filing of the affidavit is perfectly in order [*Kewangan Bersatu Bhd v. Metropolitan Property Holding Sdn Bhd*].

[3] It is established law that the spring board of any attempt to resolve any disputes begins with the parties adverting first to the arbitration agreement. In this case, the parties must first peruse the agreement and see whether it permitted that removal.

[3a] Clause 14 of the agreement was about the only provision which dealt with the forum of arbitration in the event of the occurrence of any dispute. There was no other provision in the agreement for the removal of an already appointed arbitrator who had refused to act and make an award. That being so, with the requirement that the Act be adhered to in the agreement, and the fact that ss. 12, 14(3)(a) and 24 of the Act were inapplicable for that removal, the assistance of the High Court under s. 3 of the Act might be adverted to, ie, with leave of the court.

[4] The appointment of the arbitrator was pursuant to s. 9 of the Act. Section 9 deals with clauses that fix the number of arbitrators to two. As cl. 14 of the agreement did not preclude a reference by two arbitrators, and as the applicant had adverted to s. 9, it was assumed that the applicant wanted the reference to be dealt with by two arbitrators. It followed that the notice of the applicant to the respondent was flawed as it should only contain the appointment or the concurrence of the appointment of a second arbitrator and not the removal of the incumbent one. The notice did not adhere to the requirements of the law.

[5] The refusal of the arbitrator to act will depend upon the facts and circumstances of the case. In the circumstances, the arbitrator could not be said to have refused to act within the context of s. 12(b) of the Act.

[Application dismissed.]

Case(s) referred to:

Arab-Malaysian Finance Berhad v. Serajudin bin Mohd Ismail & Anor [1999] 1 AMR 118 ***(not foll)***

Amon v. Raphael Tuck & Sons [1956] 1 QB 357 ***(refd)***

Costellow v. Somerset County Council [1993] 1 All ER ***(refd)***

H Stacey v. Diamond Metal Products Co Ltd & Anor [1935] MLJ 249 ***(refd)***

Hariram Khiaram v. Gobindram Rattan Chand [1949] AIR Sind 24 ***(refd)***

In Re An Arbitration Between Wilson & Son, And The Eastern Countries Navigation And Transport Company [1892] 1 QB 81 ***(refd)***

Kashi Prasad v. Gupteswar Singh [1956] All 431 ***(refd)***

Kewangan Bersatu Bhd (Previously Known As Kewangan Usaha Bersatu Bhd) v. Metropolitan Property Holdings Sdn Bhd [1996] 1 MLJ 79 ***(foll)***

Ny Agencies (M) Sdn Bhd v. Chew Piau Bhd OS No. R2-25-74-92 High Court Kuala Lumpur ***(refd)***

Keymer v. Reddy [1912] 1 KB 215 ***(refd)***

Lee Phet Boon v. Hock Thai Finance Corporation Berhad [1994] 3 CLJ 466 ***(refd)***

Nanyang Development (1966) Sendirian Berhad v. How Swee Poh [1969] 1 MLJ 232 ***(refd)***

Penang Development Corp v. Trikkon Construction Sdn Bhd [1997] 3 CLJ 832 ***(refd)***

Punton And Another v. Ministry Of Pensions And National Insurance (No 2) [1964] 1 All ER 448 ***(refd)***

Re Sarjit Singh Jhaira [1990] 3 MLJ 415 ***(refd)***

Sidney Faithorne Green v. Lord Penzance [1981] Vol V1 857 ***(refd)***

Sundaram v. Chew Choo Khoon [1968] 2 MLJ 40 ***(refd)***

Surendranath v. Union Of India AIR [1965] C 183 ***(refd)***

Tan Sim See & Anor v. See Chee Ping [1976] 1 MLJ 186 ***(refd)***

Uttamchand Brijlal v. Balmokand SL [1929] AIR Sind 55 ***(refd)***

Veerasingam v. PP [1958] MLJ 76 ***(refd)***

Legislation referred to:
Arbitration Act 1952, ss. 3, 9, 12, (b), 14(3)(a), 23, 24, (2)
Courts of Judicature Act 1964, ss. 3, 13
Rules of the High Court 1980, O. 5 rr. 3, 5, O. 8, O. 25 r. 7, O. 32, O. 32 r. 1 O. 41, O. 41 r. 1, O. 69, O. 69 rr. 2, (1), 3, (1), O. 92 r. 4

Other source(s) referred to:
Atkin's Court Forms, 2nd, edn, vol 29, pp 28 & 222
Black's Law Dictionary, 6th, edn
Stroud's Judicial Dictionary, 4th, edn
The Annotated Statutes Of Malaysia, p 18
The Supreme Court Practice 1997(2), p 175

For the applicant - Sheena M Sinnappah; M/s Ho & Co
For the defendant - KK Chong; Koh Kim Leng & Co

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar J:

The plaintiff (hereinafter referred to as "the applicant"), and the defendant (hereinafter referred to as "the respondent"), on 12 August 1996 executed an agreement for the construction of a 27 hole golf course at Gapam, Melaka. Embedded within the agreement was cl. 14 which provided for the referral of any disputes to an arbitrator, subject to the provisions of the Arbitration Act 1952 (hereinafter called "the Act"). True to form, a dispute arose between them pertaining to payments. As there was a dispute as to whether the matter ought to be resolved before an arbitrator, or by the High Court, the matter ended up before Augustine Paul J. His Lordship on 7 February 1998 ordered that the matter be heard by an arbitrator. Being dissatisfied with that decision, the respondent subsequently filed an appeal to the Court of Appeal. In open court before me, both parties admitted that not only did the court not name the arbitrator, but no application for stay was applied for by the respondent let alone unilaterally ordered by the court.

With the uncertainty of the forum cleared, to cut the matter short, the applicant instructed the arbitrator, one Mr. Khoo Choong Keow to proceed with the arbitration. According to the applicant, Mr. Khoo Choong Keow refused to do so. After a period of time had elapsed, the applicant eventually gave notice to the respondent of its desire to invoke s. 12 of the Act, and to proceed with the appointment of a fresh arbitrator. In a letter dated 30 December 1998 (B265), the applicant also gave the respondent twenty one days to concur to such an appointment, failing which it would be compelled to take the necessary steps, including an application to the High Court to ensure that appointment. That letter also mentioned of its intention to replace Mr. Khoo Choong Keow.

The matter culminated with this originating motion being filed in my court by the applicant on 22 April 1999. Before we could delve into the merits of the originating motion, the respondent posed a preliminary objection, on the grounds, *inter alia*:

1. the application should be by originating summons and not by originating motion as filed;
2. the affidavit of the applicant was affirmed earlier by a day to that of the originating motion, and therefore was invalid; and
3. the court could only appoint an arbitrator but not remove him due to the lacuna in s. 12 of the Act.

The respondent ventilated that the proceedings should have been begun by originating summons, as, an application by originating motion could only be undertaken if, but only if the proceedings in question were required or authorised by law to be in that format. As there is no provision in the Rules of the High Court 1980, or under any written law which states so, it therefore must follow that the application must be made by originating summons. The relevant provision adverted to by the respondent was O. 5 r. 5. It reads:

> Proceedings may be begun by originating motion or petition if, but only if, by these rules or by or under any written law the proceedings in question are required or authorised to be so begun.

In further support of his argument, the respondent resorted to the case of *Lee Phet Boon v. Hock Thai Finance Corporation Berhad* [1994] 3 CLJ 466. Abdul Kadir bin Sulaiman J there held that as the plaintiff had adopted the wrong procedure, the preliminary objection raised therefore was in order, and accordingly had the application dismissed. His Lordship at p. 469 opined:

> As mentioned earlier, originating motion not being the required or authorised mode, and the nature of the application is not one to be made by a petition, so what is left is the originating summons or a writ. Since the plaintiff has chosen the originating motion procedure to commence the action, I have no alternative but to agree with the submission of the learned counsel for the defendant and I accordingly allow the preliminary objection.

Having heard the preliminary objection, and inspite of the above authorities, I dismissed it. I now give a brief resume of the reasons. Reading encl. 2, the application before me, it was without doubt that the cause was pursuant to s. 12 of the Act, and submitted in the form of an originating motion. It is indisputable that s. 12 merely makes reference to the word "application", without specifically stating the mode of the procedure to be used by an applicant. For purposes of this case, as only sub-para. (b) is pertinent, I therefore reproduce the relevant and selected portion. It reads:

In any of the following cases:

(a) ...;

(b) if an appointed arbitrator refuses to act ... arbitrator;

(c) ...;

(d) ...;

any party may serve the other parties ... as the case may be, with a written notice to appoint ... an arbitrator, ... and after the service of the notice, the High Court may, on application by the party who gave the notice, appoint an arbitrator, ...

Two highly relevant points can immediately be gauged from the above provision, for purposes of our case, *viz*, that neither is the format of an application clarified nor the manner of the removal of an arbitrator provided for.

The Annotated Statutes Of Malaysia regarding the provision at hand at p. 18, caused some consternation in me, as it reads:

Application is made by originating summons before a judge in chambers and no appearance need be entered (see the Rules of the High Court 1980 Ord 32 and Ord 69 r. 3(3)).

To understand why this statement was authored, it is pertinent that I broach O. 69 of the Rules of the High Court 1980 at the outset. It is trite that this is a special provision which has been promulgated to deal with matters that are related to arbitration proceedings, provided for by the Arbitration Act 1952. Retracing our steps to the above statement enunciated by *The Annotated Statutes Of Malaysia*, supporting the relevant application be made by originating summons, that view should not be read out of context. It ought not be read in isolation but together with that of O. 69 r. 2(1) and O. 69 r. 3. To appreciate my comment, it is highly necessary for the Order to be read in its entirety. The abovementioned sub-provision of O. 69 r. 2(1) specifically lays down that an applicant has to proceed by originating motion if he wishes to:

1. remit an award under s. 23 of the Act;

2. remove an arbitrator or umpire under s. 24 of the Act; and

3. set aside an award under s. 24(2).

Scrutinising this provision of O. 69 r. 2, it is undeniable that matters provided for under s. 12 of the Act, particularly the issue of the present application of appointing a new arbitrator, does not fall within the ambit of this sub-rule.

Order 5 r. 5, as adverted to by the respondent, opens with the words "proceedings may be begun by originating motion". It must mean that, if the

rules or any written law require or authorise that party to proceed by originating motion, a party may not necessarily choose that course of action. He has another choice. The abovementioned provision of O. 69 r. 3(1) confirms this view, as it specifically provides that such applications may be exercised by a Judge in Chambers or the Registrar.

It goes without saying that this provision arms the judge with additional power, in that, apart from hearing the matter in open court, in suitable cases dependant upon the act of the applicant, may entertain them in Chambers. It therefore also follows that if the applications were to be made before a Judge in Chambers or the Registrar, then the full effect of O. 32 of the Rules of the High Court 1980, will have to be complied with. Under the latter order, except as provided for by O. 25 r. 7 (duty to make all interlocutory applications on summons for directions), every application in Chambers must be made by summons in form 62. It is perhaps on this sequential analysis that *The Annotated Statutes Of Malaysia* arrived at that above conclusion of p. 18.

Based on the above prognosis, as the current application (encl. 2) was heard in open court, O. 69 r. 3 read together with O. 32 r .1, were therefore quite irrelevant. Formatwise, encl. 2 was in order. Unfortunately, by virtue of O. 5 r. 5, read together with O. 5 r. 3, the respondent submitted that the application should have been heard in Chambers. However frivolous this objection may appear, I could not nonchalantly dismiss it, due to those provisions. Why then did I dismiss the preliminary objection?

I will begin by stating that, in the circumstances of the case it was necessary for me not to delay the matter, primarily on the pretext of some defect of format. It was understood that the High Court Order was issued sometime on 7 February 1998. The originating summons was filed sometime on 11 December 1997. The notice of demand against the respondent was made *vide* a letter dated 25 June 1997. Chronologically, either in term of time or events, much water had flowed under the bridge. To allow the preliminary objection would merely exarcebate the situation, and certainly would do a disservice to the current backlog faced by the courts. In *Tan Sim See & Anor v. See Chee Ping* [1976] 1 MLJ 186 Arulanandom J had occasion to opine:

> The purpose of the rules is not to enable defendants to come to court and waste the court's time by complaining the "i"s are not dotted or the "t"s crossed in the hope of making a few paltry pennies in costs. It is equally not intended for parties to cause in prolixity of writs expecially at a time when the court is so overburdened with writs that there is a huge backlog of cases. Order 70 specially seeks to prevent frivolous applications to set aside writs. In this case even if the court saw fit to strike out the writ the plaintiffs will file another writ on the same facts with the same cause of action and it is not the duty of the court to cause or encourage prolixity of writs.

It was based on that practical reason that I invoked O. 92 r. 4 "to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court" (*Keymer v. Reddy* [1912] 1 KB 215 at 221). No doubt before arriving at that decision I had to ensure that the discretion was exercised properly and permitted by law (*Veerasingam v. Public Prosecutor* [1958] MLJ 76 at 79).

Agreeably, where the written law or rule provides for an application to the High Court, but without specifying the type of process, the format must be by way of an originating summons (*Re Sarjit Singh Khaira* [1990] 3 MLJ 415) On the other hand precedentwise, some breathing space was also provided to me when the court in *Nanyang Development (1966) Sendirian Berhad v. How Swee Poh* [1969] 1 MLJ 232, indicated that where an Act did not specify the mode of application to be made to the court, the application could be made in any form in which the court could be moved. In *Nanyang Development*, where the applicant had applied by way of originating motion to remove a caveat, with the respondent stating that the application should have been by originating summons, Raja Azlan J (as he then was) decided that the court could be moved by originating motion.

It is established law that proceedings begun by originating summons are those:

(a) in which the sole or principal question at issue is or likely to be, one of the construction of any written law or of any instrument made under any written law, or of any deed, will, contract or other document, or some other question of law; or

(b) in which there is unlikely to be any substantial dispute of fact.

The current application, as supported by the affidavit, in no uncertain terms highlighted that there were many intricate legal posers still left unresolved, compounded further by substantial dispute of facts. I begin first with the legal posers, namely:

(1) whether a stay was granted;

(2) whether the arbitrator could grant a stay;

(3) whether an order of stay should emanate from the judge;

(4) whether in the circumstances of the case, eventhough an appeal had been filed in the Court of Appeal, that appeal could double up as a stay;

(5) the legal effect of the alleged stay if a new arbitrator were to be appointed;

(6) even if the application were to be made by originating motion, could the court remove the present arbitrator when there is no provision in s. 12 of the Arbitration Act to do so;

(7) whether the appeal was properly filed in the Court of Appeal when leave was yet to be obtained;

(8) whether the decision of Augustine Paul J could be appealed by the respondent; and

(9) the legal problem did not relate to an issue of construction of any law or legal documents.

As regard the facts, there were substantial dispute of facts, *viz*.

(1) whether any sittings had been held pursuant to the matters to be arbitrated.

(2) whether meetings had been held to determine on the issue of the alleged stay;

(3) whether the doctrine of *audi alteram pattern* had been adhered to fully, even if the correspondences could be construed as "sittings";

(4) whether in the circumstances of the case the arbitrator could be construed as having refused to act within the context of s. 12 of the Arbitration Act; and

(5) whether in the circumstances of the intricate facts, combined with the legal posers, there was thus a probability that both parties would be unable to satisfactorily explain the actual scenario within a short time in Chambers.

By analogy, in certain circumstances an action by writ is preferable to that of an action by originating summons, eventhough the law does require, that latter format. Page 222 of Atkin's Court Forms 2nd edn, vol. 29 in clear terms reads:

> It is also stated to be inappropriate where the plaintiff for any other reason considers the proceedings to be more appropriate to be begun by writ ... It is suggested that the procedure will in general be inappropriate in all cases where the precise formulation of the claim of the plaintiff or the defendant is a matter" of difficulty which ought to be resolved by precise and accurate pleadings.

(See also *Punton And Another v. Ministry Of Pensions And National Insurance (No. 2)* [1964] 1 All ER 448). The respondent during the preliminary objection did indicate that he was not partisan to having Mr. Khoo Choong Keow as the arbitrator, nor was he averse to Mr. Richard Talalla, as the suggested new arbitrator. As far as he was concerned he approached the matter from the view point of the law. Having considered the respondent's stance , I was unable to detect any prejudice that would befall it, even if I were to hear the matter in open court, or for that matter to remove Mr. Khoo Choong Keow and have him replaced by another person (*Costellow v. Somerset County Council* [1993] l All ER 952). In term of the procedural defect, if it could be construed as

so, which as said above could not occasion any prejudice to the respondent, was capable of being compensated by costs (*Sundaram v. Chew Choo Khoon* [1968] 2 MLJ 40).

Additional to the above ground, revolving around the application's format, the respondent submitted that the applicant's affidavit was defective in that it was affirmed prior to the filing of the originating motion. Datewise, the originating motion was filed on 2 April 1999, whilst the affidavit was affirmed on 1 April 1999. The respondent resorted to O. 41 of the Rules of the High Court 1980 and the case of *Arab-Malaysian Finance Berhad v. Serajudin Bin Mohd Ismail & Anor* [1999] 1 AMR 118 for support. Having perused O. 41 and the latter case, I was unable to accede not only to the suggestion of the respondent, but with respect also to the view held by the court. Order 41 r. 1 reads:

> ... every affidavit sworn in the cause or matter must be entitled in that cause or matter.

The court in the above case categorically opined that to fully comply with the above provision, the case number relating to that cause or matter must be made available. On that interpretation, it would be improbable that that case number could be made available had the affidavit been affirmed earlier, as the action was yet to be filed. Scrutinising O. 41 further, the phrase "entitled in that cause or matter", could not have been meant to refer to the case number, but to the action between the existing parties (*Amon v. Raphael Tuck & Sons* [1956] 1 QB 357; *Stroud's Judicial Dictionary* 4th edn,) My view is fortified by a *Practice Note* in [1966] 2 All ER 943, which in a gist reads:

> Notwithstanding Ord. 41, r. 1(2) of the R.S.C (Revision) 1965(1), ...
>
> If the title of the cause or matter contains the name of a person ..., with reference to whom or to whose property ... the proceedings are brought, ... For example, such titles as "in the Estate of A. B. deceased" or "In the matter of Trusts of ..." (as the case may be) should continue to be used.

Perusing the above Practice Note, the usage of the word "title/titles" must lend credence to my stance that the word "entitled" in O. 41 r. 1, must refer to the titles. In this instance the titles must be "perkara seksyen 12 Akta Timbangtara 1952 (in the cause s.12 of the Arbitration Act 1952) and Dalam Perkara A. 8, Kaedah Mahkamah Tinggi 1980" (in the matter of O. 8 of the Rules of the High Court 1980).

In England, in certain instances, if the date is not crucial the affidavits sworn before the commencement of proceedings will still be accepted. Without having to resort to a dissertation permit me just to reproduce p. 206 of Atkin's Court Forms, 2nd edn, vol. 28, which reads:

> For the modern practice under which, if the date is not crucial, affidavits sworn before the commencement of proceedings may be accepted, see Chancery Division Practice Direction No. 8A (iii): Supreme Court Practice 1993 para 820.

Trudging further, I managed to locate the updated view at p. 175 of *The Supreme Court Practice 1997(2)*, where it is written:

> (iii) Swearing before commencement of proceedings
>
> Affidavits will not be rejected because they have been sworn shortly before the proceedings started. The Court may nevertheless at any time direct the re-swearing of such an affidavit and will do so if the affidavit seeks to prove facts which have to be shown to be existing at the date of the commencement of the proceedings, for example that money is owing at that date, and the cause of action would not otherwise be established. In cases where the date of commencement is of no particular significance, for example in most applications for construction of documents ..., the court will assume that state of affairs set out in the affidavit ...

Lastly, still on this point the learned judge had occasion to concede in *Arab-Malaysian Finance Berhad v. Serajudin Bin Mohd Ismail & Anor (supra)* at p. 121, that:

> ... in so far as interlocutory or *ex parte* applications are concerned, the courts have accepted the affidavit affirmed prior to the filing of the application on the express undertaking of counsel to reswear the said affidavit ...

I see no reason why a differentiation of treatment should be permitted between a case which is *inter parte* or *ex parte*, whenever affidavits are utilised to support the respective actions. I see no justification in favouring one over the other. If I may reiterate my view, as nothing is mentioned of the case number in the above authorities let alone the time of the affirmation of an affidavit under O. 41 vis-a-vis the filing of the motion, it is therefore reasonable to conclude that the law only require strict compliance with rules that are statutorily promulgated. The dearth of timing and the requirement of having an administrative case number, therefore will not adversely affect the acceptability of that affidavit.

To touch briefly on the meaning of "cause" and "matter", Black's Law Dictionary 6th edn, defines "cause", *inter alia*, as a reason for an action or condition; a ground of a legal action. Further down, under the heading of "cause of action", that phrase is defined as:

> the fact or facts which give a person a right to judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which would entitle party to sustain action and give him right to seek a judicial remedy in his behalf.

In *Sidney Faithorne Green v. Lord Penzance* [1881] vol VI 657 at 671 Lord Selborne had occasion to say:

> ... the sole question is whether it was a "cause", ... I have no hesitation about the word "cause." It is not a technical word signifying one kind or another, it is causa jurisdictionis, any suit, action, matter, or other similar proceeding competently brought before and litigated in a particular Court, ...

I now touch on the definition of "matter". *Black's Law Dictionary (supra)* at p. 978 defined it as:

> substantial facts forming basis of claim or defence; facts material to issue; substance as distinguished from form; transaction, event, occurrence, subject matter of controversy.

Again there is nothing mentioned of the case number in this definition.

As the case of *H Stacey v. Diamond Metal Products Co. Ltd. & Anor* [1935] MLJ 249 was accorded some attention by the judges of the earlier cases, it would not be out of order if I were to likewise briefly touch on it. Perusing the facts of Stacey, I am mindful to comment that apart from the objector being unable to cross-examine the deponent as he had died, the material affidavit was also general in nature. It was not "entitled". There was no cause or matter entitled in the affidavit that could be construed as having been anticipated by the deceased. On that score, as it had not complied with the requirements of O. 41 I am not surprised of the outcome when Terrell J rejected that impugned affidavit.

Order 41 Rules of the High Court 1980 provides that the affidavit must be entitled, meaning that that affidavit must have been executed in anticipation of some specific cause, suit or action. In this cyber-set era, where deponents may be on the move for long stretches of time, the retention of solicitors to act on their behalf have become a common phenomenon. One must bear in mind that globalisation or cross-border business is the order of the day nowadays. The legal system will invariably act as an obstacle to economic progress if parties are expected to affirm the affidavits only on the day or after the suits or actions have been filed. What is wrong with affirming an affidavit prior to the filing of the originating motion, so long as it is entitled? Truth will never be changed by time. It cannot be equated with a glass of milk that will turn sour kept too long in the cupboard, while waiting for it to be consumed.

In conclusion, I therefore without hesitation totally agree with the view held by Selventhiranathan J in *Kewangan Bersatu Bhd (Previously Know As Kewangan Usaha Bersatu Bhd) v. Metropolitan Property Holdings Sdn Bhd* [1996] 1 MLJ 79, when His Lordship at p. 83 said:

> In the absence of any requirement of law for the affidavit to be affirmed on the same date as that on which the originating summons is filed or later, an affirmation which precedes the filing of the affidavit, as occured here, is perfectly in order.

The above dissertation is to take care of the objection pertaining to the affidavit.

Now I will touch on the legal arguments connected to s. 12 of the Act, particularly on the obvious silence as to the removal of an incumbent arbitrator by the High Court. The respondent submitted that as the court could only appoint but not remove, the application therefore was defective.

This s. 12, in particular sub-para. (b) speaks of the High Court being given the power to appoint an arbitrator, on condition all the other pre-requisites have been complied with. For purposes of this case, before the High Court could appoint an arbitrator these conditions, *inter alia*, must prevail:

(a) an arbitrator had already been appointed (*Hariram Khiaram v. Gobindram Rattan Chand* [1949] AIR Sind 24);

(b) that incumbent arbitrator had refused to act (the factors of incapacity to act or that he had died are irrelevant, as those grounds have not been invoked by the applicant);

(c) the interested party may serve a written notice to the respondent to have an arbitrator appointed (*Uttamchand Brijlal v. Balmokand SL* [1929] AIR Sind 55);

(d) after twenty-one clear days, with no appointment of the second arbitrator having taken place, an application may be made to the High Court by the party who served that written notice for such appointment;

(e) the High Court may thereafter appoint an arbitrator;

(f) that newly appointed arbitrator shall have similar powers to that of the incumbent arbitrator; and

(g) that new arbitrator shall make an award as if he had been appointed by consent of all parties.

With no provision promulgated to provide for the removal of the incumbent arbitrator, the court's power is severely limited to the appointment of a new arbitrator.

Parties cannot utilise any machinery provided for by the Act, unless the case falls within its four corners. It is also established law that the spring board of any attempt to resolve any disputes invariably would begin with parties adverting first to the arbitration agreement (*Ny Agencies (M) Sdn Bhd v. Chew Piau Bhd* OS No. R2-25-74-92 High Court Kuala Lumpur; para 875 Mallal's Digest 4th edn). As in this case, the parties must first peruse the agreement and see whether it permits that removal. If the answer is in the positive then the parties must do the needful themselves. The provisions of ss. 14(3)(a) and 24 are certainly inapplicable for purposes of removing that incumbent arbitrator applied for under s. 12. That being so, s. 3 of the Arbitration Act 1952 may be adverted to for that purpose (*Penang Development Corp v. Trikkon Construction Sdn Bhd* [1997] 3 CLJ 832; [1997] 3 MLJ 115).

Inspite of this rather strange predicament of the parties possibly having two arbitrators, with one not being appreciated by the applicant, I find no legal foundation to support any suggestion that encl. 2 should be struck out merely on that ground. Paragraph (a) of encl. 2 prays for the removal of Mr. Khoo Choong Keow whilst (b) prays for the appointment of Mr. Richard Talalla as an arbitrator. Prayer (d) allows the court the leeway to mete out any consequential orders. 1 find solace in the fact that the law under sub-para (b) of s. 12 of the Act empowers me to appoint a second arbitrator without the necessity of having to remove the incumbent one (consider the discussion in *Kashi Prasad v. Gupteswar Singh* [1956] All 431). Based on all the above reasons, how could I not be prompted to dismiss the preliminary objection, and accordingly permit the matter to proceed forthwith.

Decision With Regard To The Prayers In Encl. 2

Clause 14 of the agreement is about the only provision which deals with the forum of arbitration, in the event of the occurrence of any dispute. This clause in brief provides for:

1. the forum to deal with any dispute or difference of opinion;
2. matters touching on any cause or matter or anything contained in the agreement or operation or construction of contract or anything connected with the agreement;
3. the referral to a single arbitrator if agreed upon;
4. the referral to two arbitrators with each appointed by either party; and
5. the acceptance of the Arbitration Act 1952 (Act 93) to be part of the agreement.

Highly noticeable in this clause is the absence of any provision for the removal of an already appointed arbitrator who has refused to act and to make an award. That being so, with the requirement of the Arbitration Act 1952 (Act 93) being adhered to, the assistance of the High Court under s. 3 may be adverted to (*Penang Development Corp v. Trikkon Construction Sdn Bhd* [1997] 3 MLJ 115). Mokhtar Sidin JCA at p. 127 in clear terms had occasion to say:

> ... In the present appeal, it has not been shown to us that the arbitration agreement has given the power for revocation. In my opinion, in such a situation, the revocation could only be made under s. 3 of the Act, that is by leave of the court.
>
> (5) ...
>
> As can be seen, s. 5 of the Indian Arbitration Act is in pari materia with s. 3 of the Act. As such, once an arbitrator has been appointed, his appointment is irrevocable except with the leave of the court ... Until this leave of the court is obtained, the arbitrator continues to be an arbitrator.

From the above explanations, apart from cl. 14 being silent as to the removal of the incumbent arbitrator, and ss. 12, 14(3)(a), and 24 being inapplicable for that removal, the court is thus only left with s 3. This section reads:

> The authority of an arbitrator or umpire appointed by or by virtue of an arbitration agreement shall, unless a contrary intention is expressed in the agreement, be irrevocable except by leave of the High Court.

To resolve the problem at hand, it is of paramount importance that the facts be alluded to, especially that part prior to the recruitment of Mr. Khoo Choong Keow. It was not denied by the respondent that it was more inclined to have the matter resolved before a court of law. The applicant on the other hand wanted the matter to be arbitrated. The respondent was consistent in its stance when it refused to nominate an arbitrator. Due to that recalcitrance on the part of the respondent, the applicant unilaterally submitted the name of Khoo Choong Keow (see letter dated 11 September 1997 p. 189(b); the latter also accepted that appointment). Strangely enough that appointment was pursuant to s. 9 of the Arbitration Act (see letter dated 13 October 1997 (B191) which also mentioned that provision). Section 9, as opposed to s. 8 of the Act, deals with clauses that have fixed the number of arbitrators to two; s. 8 fixes the number to one. As cl. 14 does not preclude a reference by two arbitrators, and as the applicant had adverted to s. 9, I must assume that the applicant wanted the reference to be dealt with by two arbitrators. As at the material time only Mr. Khoo Choong Keow had been appointed, without any objections forthcoming from the respondent, one more position therefore was yet to be filled. To reiterate, cl. 14 clearly spells out, *inter alia*, "if the parties agree upon one or otherwise to two arbitrators one to be appointed by each party". As the applicant had already used up its right of appointing one arbitrator, the filling up of that vacancy was thus the prerogative of the respondent. Inspite of this scenario, the applicant gave notice to the respondent to concur in the appointment of a fresh arbitrator within twenty one days, failing which the applicant intended to apply to the High Court to replace the incumbent arbitrator with a new one (p. 265 of (B)). Undoubtedly this notice was flawed, as it bespoke of a new arbitrator being appointed in place of the incumbent one (and with the latter being removed), on the ground of refusal to act, inspite of the court order dated 7 February 1998. As I see it, as the applicant had categorically alluded to s. 9 of the Arbitration Act 1952, the notice served by the applicant to the respondent therefore should only contain the appointment or the concurrence of the appointment of a second arbitrator, and not the removal of one, on the pretext of a refusal to act. In other words that notice did not adhere to the requirements of the law.

Even if the court were minded to appoint a fresh arbitrator, on the allegation that the incumbent one had refused to act, the pre-conditions to do so must be present. Whether Mr. Khoo Choong Keow had refused to act will depend

upon the facts and circumstances of the case. The exercise of that discretion by the court must be carried out properly and without arbitrariness (*In Re An Arbitration Between Wilson & Son, And The Eastern Countries Navigation And Transport Company* [1892] 1 QB 81). Conversely, if there are compelling circumstances justifying the refusal of the exercise of that discretion, the court may do so (*Surendranath v. Union Of India AIR* [1965] C 183).

Let us now sift the evidence, and see whether factually Mr. Khoo Choong Keow had refused to act, or had merely erred when he stayed the action based on a wrong appreciation of the law. It is trite that an error in the appreciation of the law has never been construed as a refusal to act on the part of the arbitrator. To resolve this problem, it is therefore necessary that the chronology of facts and events be deciphered. They are as follows:

1. on 11 December 1997 an application for a declaration was filed by the applicant pursuant to cl. 14 of the agreement;

2. on 2 February 1998 Augustine Paul J ordered that the dispute be referred to an arbitrator. Neither was an application made to have the matter stayed nor one unilaterally ordered by the court;

3. pursuant to that decision, the respondent on 19 February 1998 filed an appeal to the Court of Appeal;

4. *vide* a letter dated 9 April 1998 the applicant supplied a copy of the High Court's order to the arbitrator, together with the instruction to set a date for a preliminary meeting;

5. *vide* a letter dated 29 April 1998 the arbitrator wrote to the applicant stating that due to that appeal, and unless the applicant could show prejudice, it was prudent for him to await the outcome of the appeal;

6. in response to that reply, the applicant wrote to the arbitrator stating that it would suffer prejudice unless the arbitration was proceeded with;

7. *vide* a letter dated 15 May 1998, the arbitrator wrote to both parties for their views as to whether the arbitration should proceed;

8. one month later, *vide* letter dated 15 June 1998 the arbitrator informed the parties that the matter will be stayed;

9. being dissatisfied the applicant again *vide* letter dated 29 June 1998 applied for leave to submit further on the necessity of carrying on with the arbitration;

10. *vide* letter dated 2 July 1998 the arbitrator allowed the applicant's application for leave;

11. pursuant to that letter, until sometime in November 1998 correspondences took place between parties; with submissions also sent to the arbitrator.

12. on 6 November 1998, the arbitrator informed both parties that after having considered the submissions of both parties, his previous decision to have the matter stayed would remain;

13. *vide* letter dated 26 November 1998, the applicant informed the arbitrator that unless the arbitration proceedings was begun it would construe that failure as a refusal to act;

14. in reply *vide* letter 30 November 1998 the arbitrator reiterated his stance of stay, and at the same time asking both parties to inform him when the appeal before the Court of Appeal would be heard;

15. inspite of that reply, the applicant wrote back to the arbitrator informing him of its firm stance as per its previous letter of 26 November 1998;

16. *vide* a letter dated 30 December 1998 the applicant gave the relevant notice pursuant to s. 12 of the Arbitration Act 1952;

17. (thereafter letters were exchanged between the parties and one Mr. Richard Talalla);

18. on 2 April 1999 the applicant filed the certificate of urgency; and

19. on 22 April 1999 the originating motion was filed.

Perusing the above chronology of events, I am satisfied that at no stage of the exchange of letters did the arbitrator convey any impression that he took the matter lightly. He promptly replied every letter or every query made by the applicant to him. He explained in some detail his stance for the stay, and gave ample opportunity to both parties to air their views before arriving at his decision. In the process he even permitted the applicant to have two bites at the proverbial cherry by allowing it to submit further on the issue of stay. The arbitrator, after considering all the factors before him, in particular the factor of that appeal to the Court of Appeal, decided to order that stay. Whether he wrongly believed that:

a. the respondent could appeal against the decision of Augustine Paul J. Under s. 3 of the Courts of Judicature Act 1964 "decision" means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of parties. It is my view that the order of Augustine Paul J did not finally dispose off the rights of parties;

b. due to the appeal a stay automatically followed. Under s. 73 of the Courts of Judicature Act 1964 and s. 13 of the Rules of the Court of Appeal 1994, an appeal shall not operate as a stay of execution of proceedings ... unless the High Court or the Court (here "court" means the Court of Appeal) so orders. Here neither did the High Court nor the Court of Appeal order a stay of execution of proceedings;

c. leave was not necessary. Under the Court of Appeal Practice Direction No. 2 of 1996, for purposes of appeals to the Court of Appeal, no leave to appeal is necessary in certain instances. The appeal that emanated from the decision of Augustine Paul J did not come within those exceptions. In other words, even if the decision were appealable, of which I have concluded as not, leave is certainly required; and

d. he could grant a stay based on the above reasons,

this belief was an error based on the wrong appreciation of the law. Certainly it could not factually be said that the arbitrator had refused to act in the context of s. 12(b) of the Arbitration Act 1952.

On the above analysis of the facts and law, as I am not empowered to remove the encumbent arbitrator under s. 12, prayer (a) of encl. 2 therefore fails. Apart from that absence of power, I am not convinced that the arbitrator had refused to act pursuant to the reference. I am also unable to appoint Mr Richard Talalla as the new arbitrator, as the notice served on the respondent was not in order. It did not contain the particularities envisaged by s. 12(b) read together with s. 9 of the Act. I therefore have no hesitation in dismissing this application with costs.

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